

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH BERNARD TURNER,

Defendant-Appellant.

UNPUBLISHED
November 6, 2007

No. 272402
Wayne Circuit Court
LC No. 06-004278-01

Before: Zahra, P.J., and White and O'Connell, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to two years' probation for the concealed weapon and felon in possession convictions, to be served concurrently to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Detroit Police Officer Dwayne Robinson and his partner Officer Jamale Turner were traveling in an unmarked police car and observed defendant sitting in the driver's seat of a white Buick that was idling curbside on Plymouth Road. Robinson observed defendant pour a drink from a bottle of Seagram's gin into a cup. Another man, later identified as Eric Turner, the son of the Buick's owner, was sitting in the front passenger seat of the car. Robinson made a U-turn and pulled up behind the Buick, initiating a traffic stop. From this vantage point, Robinson observed defendant's upper body "lift up as if to put something under his leg" and told his partner what he had seen. Robinson walked up to the Buick on the driver's side, while Officer Turner approached on the passenger side. Smelling intoxicants on defendant's breath, Robinson ordered defendant out of the car. As defendant started to get out, Robinson observed a small .25-caliber handgun sitting on the driver's seat. Robinson did not want defendant to reach for the weapon so he pulled him backward, told his partner about the pistol, and handed defendant to other officers who had stopped. Robinson then retrieved the pistol. Both defendant and Eric were arrested in connection with possession of the weapon.

Officer Turner testified that he did not see either defendant or the passenger make a suspicious movement, but when Robinson grabbed defendant as he was getting out of the car, he signaled to Officer Turner that there was a weapon inside. Officer Turner did not initially see the pistol on the front seat, but he saw Robinson retrieve it.

According to defendant, the officers had their guns drawn as they approached the Buick and wrestled him out of the car although he did not resist them. Defendant denied possessing a gun that evening. Defendant's wife and sister-in-law also testified that they did not see defendant possess a gun that evening.

The trial court found the only fact in dispute was whether there was a pistol on the front seat as Robinson testified and defendant denied. The court discredited defendant's testimony and accepted the officer's testimony. It noted that defendant had argued that the pistol belonged to Eric Turner, and the officers probably arrested both men because they could not sort it out at the time. However, the trial court found that the prosecutor had proven that defendant was sitting on top of the pistol, so he illegally possessed it as the officers approached.

On appeal, defendant argues that there was insufficient evidence to convict him of the charged offenses. "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Applying this deferential standard, we will not disturb the trial court's credibility choices or any inferences that the trial court reasonably deduced from the facts. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant challenges only the element of possession, arguing that there was insufficient evidence to show that he "possessed" the gun. "Possession may be actual or constructive and may be proved by circumstantial evidence." *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). "[A] defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant." *Id.*

Here, Robinson testified that he observed defendant raise his upper body as if to hide something under him, and he found the pistol where defendant was just sitting. Although Officer Turner did not see the gun on the seat, he explained this fact by stating that he was focusing on the passenger, and, being a tall man, he could not see the driver's seat from the passenger side window. He did see Robinson retrieve the weapon from the car. Deferring to the trial court's decision to discount defendant's testimony and credit Robinson's testimony, there was sufficient evidence to find that defendant was in constructive possession of the pistol.

Defendant also argues that the trial court abused its discretion in failing to dismiss the case because the prosecutor failed to produce the correct firearms report until the day of trial. We disagree. We review for abuse of discretion a trial court's decision whether to dismiss a case for a discovery violation. *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002). "When determining the appropriate remedy for discovery violations, the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance." *Id.*

Here, defendant's trial attorney moved for dismissal on the day scheduled for trial, arguing that the prosecution had twice given defense counsel a firearms report in which the alleged possessor was someone other than defendant. The prosecutor responded that she believed the police must have put the wrong report in the police jacket and that she had been working diligently to get the right report. The court ruled that dismissal was too drastic, and

instead it adjourned the trial to a date mutually acceptable to both parties. It also allowed the defense to add any additional witnesses relevant to the correct report and gave defendant the opportunity to raise any latent prejudice if it ever developed. The court denied the motion to dismiss without prejudice.

Under MCR 6.201(B)(2), the prosecution, upon request, must provide a defendant “any police report concerning the case.” However, it appears that the failure to produce the correct firearms report was inadvertent, and the prosecutor corrected the oversight on the date set for trial. In other words, the prosecutor complied with the court rules, albeit tardily. To remedy this issue, the trial court adjourned the trial from June 29, 2006, to July 10, 2006, a date acceptable to both parties, and allowed defense counsel the opportunity to add witnesses if necessary. At the beginning of trial on July 10, defense counsel indicated that he had time to review the document and he did not renew the motion to dismiss. Because the trial court fashioned a remedy designed to mitigate any prejudice to defendant, and because defendant did not articulate the nature of any specific prejudice caused by the prosecutor’s tardiness in producing the correct report, the court did not abuse its discretion by denying defendant’s motion to dismiss.

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Peter D. O’Connell